Petition

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1981

HORACE L. PATTERSON, et al.,

Petitioner,

vs.

YOUNGSTOWN SHEET AND TUBE COMPANY and LOCAL 6, BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE UNITED STATES SUPREME COURT.

II. WHETHER THE SEVENTH CIRCUIT'S DECISION AFFIRMING THE TRIAL COURT'S AWARD FOR BACK PAY AND ATTORNEY FEES CONFLICTS WITH THE SUPREME COURT DECISIONS AND TITLE VII WHICH MAKES TITLE VII COMPLAINANTS WHOLE AND COMPENSATES ATTORNEYS AS THEY ARE COMPENSATED IN COMPLEX FEDERAL CASES.

III. THE SEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, HORACE L. PATTERSON, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's May 7, 1980 decision which awarded $28,000 in back pay to be divided among 55 Plaintiffs, covering a period of 14 years of discrimination, and which awarded plaintiffs' four attorneys a total of $66,000 in fees for 1769.95 hours of work covering a period of 9 years.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1981. This petition for certiorari was filed less than 90 days from the beforementioned date. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

FEDERAL STATUTES INVOLVED

Title VII §703(a)(c)(d).

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(d) It shall be an unlawful employment practice for any employer, labor, organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Title VII §706(g)(k).

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).

(k) In any action or proceeding under this title, the Court, in its discretion, may allow the prevailing party . . . a reasonable fee as part of the costs (July 2, 1964).

STATEMENT OF FACTS

The Court should note that, from 1952 to the effective date of Title VII, there was admitted intentional discrimination against Plaintiffs (Mason Helpers) by Youngstown Sheet and Tube Company (Youngstown). On September 21, 1969, 10 of the 55 Plaintiffs filed charges of racial discrimination with the Equal Employment Opportunity Commission (EEOC) against Youngstown and Local 6 of Brick Layers International Union (Local 6). The Plaintiffs alleged in the charge that "Youngstown ha(d) maintained and/or is maintaining a system that ha(d) prevented (them) and others from having the opportunity from progressing from Mason Helper to Brick Mason because of race, and that Local 6 was a party to this practice". The Plaintiffs filed a Federal Complaint on October 22, 1971, which included the allegations in the "charge" and alleged that the Plaintiffs were denied "equal" access to the various departments and the jobs therein.

Beginning in February, 1972, Defendants contested Plaintiffs' certification of this lawsuit as a class action and attempted to limit the scope of the Complaint. The Court adjudicated all the issues in favor of the Plaintiff class. The class was certified as "Black employee's of the Defendant Company who are employed as Mason Helpers and who have been so employed on or since July 2, 1965, or enjoyed right of recall as of that date". The Court also specifically denied Defendants' attempt to limit the complaint to specific matters raised in the "charge". Judge Beamer stated ". . . that the Seventh Circuit has recognized that, in an action involving allegations of systematic and pervasive discrimination, the Court's plenary powers to fashion affirmative

relief eradicating present discrimination and redressing the adverse consequences of past unlawful conduct should be broadly read and applied so as to effectively terminate the practice and make its victims whole. *Bowe* v. *Colgate*, (416 F.2d 711, 1969 CCA 7th)." EEOC repeatedly sought leave to intervene but was thrice denied.

On March 3, 1977 (five years after joinder of issues), Youngstown filed a Motion for Partial Summary Judgment on the same grounds rejected by Judge Beamer, i.e., that certain claims made and relief sought by Plaintiffs extended beyond the scope of the "charge". District Court Judge Allen Sharp reversed District Court Judge George N. Beamer and confined the Complaint to a consideration of Plaintiffs' opportunities to progress from Mason Helper to Brick Mason only. On August 12, 1977, the Court granted Plaintiffs' Motion for Partial Summary Judgment by finding that Youngstown was guilty of violating Plaintiffs' Title VII rights in the selection of Mason apprentices from July 2, 1965, to September 21, 1969. A trial was scheduled for the purpose of determining the liability of Local 6 only, but the Court over the objections of the Plaintiffs, considered Defendants' evidence, affidavits, and arguments as to back pay against Youngstown and Local 6. The Court refused to consider any evidence presented by the Plaintiffs. The Court repeatedly advised the parties that the trial would be confined to the issue of Local 6's liability. Nevertheless, the Court considered Youngstown's evidence which was submitted for and used to minimize Youngstown's back pay liability.

At the conclusion of the case of Local 6's liability and on the last day of trial, the Court invited comments from the parties as to the formula that should be applied to determine back pay. Plaintiffs submitted the formula that each of the 55 Plaintiffs should be "made

Whole" in keeping with *Bowe* v. *Colegate*. See also *Albermarle* v. *Moody*, 422 U.S. 405 (1975). The 55 Plaintiffs submitted that there had been enough outside contracting; hiring of Masons from outside the Plant; and employment opportunities in other areas of the Youngstown's Plant of 11,000 employees, to have provided equal advancement and promotional opportunities for each member of the class. Plaintiffs also suggested that a "quagmire" should be avoided and that all matters should be resolved in favor of the victims. Finally, the Plaintiffs submitted that the "period" of the violation should be from the effective date of the act (July 2, 1965) until the date of trial.

The trial Court found that the 55 Plaintiffs were entitled to only one job in Youngstown's 11,000 employee plant for the period beginning January 10, 1968 and ending February 10, 1974, and awarded Plaintiffs $28,000.00 in back pay to be divided among the 55 class members, although the Plaintiffs had more seniority and job experience than the white Masons who applied for jobs at Youngstown after 1965. Finally on May 30, 1980, the trial Court awarded Plaintiffs' attorneys' fees as follows: Honorable Marion Garnett, $15,000.00, even though he spent 466 hours on said case; Leroy P. Vital, $30,000, even though he spent 927.7 hours on said case; Earl B. Williams, $12,500.00, even though he spent 376.25 hours on said case; and the Honorable Frederick Work, $9,000.00.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THE UNITED STATES SUPREME COURT.

The Seventh Circuit Court of Appeals Ruled That Youngstown's Practice of Contracting-Out, Which Denied Plaintiff's Opportunities In The Plant, Was Exempted From Being A Violation Of Title VII And A Consideration For Back Pay Computation Because The Practice was Industry Wide.

The Supreme Court should note that the Seventh Circuit acknowledged that the practice of "contracting-out," as it relates to Back Pay Liability under Title VII, is a practice which has never been considered in a Supreme Court decision. The Seventh Circuit made the novel ruling that employees of an independent contractor cannot be deemed employees of the employer for purposes of back pay liability under Title VII". The Court further stated that, ". . . The "contracting-out" of mason work was common place in the industry. . . .". Plaintiffs had urged upon the Appellate Court that:

> "The Court (below) ignored all the gross jobs which could have been reconstructed from the practice of outside-contracting and that which would have been created but for the hiring of white persons at mason level . . .", and that the Court further erred in ruling that, of the defendants' admitted vacancies, only one was allowed plaintiffs, when in fact, all should have been allowed plaintiffs because of their seniority.

Plaintiffs had been the victims[1] of intentional discrimination for thirteen (13) years before the Act, and continued to be confined[2] in a dead-ended status even now.

After finding both defendants guilty, the District Court, then required historical reconstruction of "vacancies" for back pay, under *Teamsters* v. *United States*, 431 U.S. 324 (1977), rather than making each of the 55 plaintiffs "whole" as set forth in the Act, and this Seventh Circuit's decision in *Bowe* v. *Colgate*, 416 F. 2d 711. See also *Albermarle* v. *Moody*, 422 U.S. 405. In *Teamsters*, this Supreme Court was concerned with preventing a windfall to 3,000 employees where there were insufficient jobs available. Whereas, in the instant case, there is no question that there were sufficient jobs which should have been available to the plaintiffs, both within and outside the mason department of the 11,000 employee plant.

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[1] It is undisputed that the Superintendent of the Company's Mason Department continued to declare that there would never be any black masons at Youngstown.

[2] Plaintiffs became victims of a dead-ended, boxed-in confinement, as mason helpers through a combination of employment practices of the Defendants. The first was the undisputed intentional discrimination by the company for more than thirteen years (13) before the effective date of the Act. The second was the Local 6 discriminatory by-laws which favored and preserved a white membership. The third practice was the company's assignment and retention of blacks in the mason helper unit. The fourth and fifth practices were that of outside contracting and the hiring of masons from the outside of the plant to fill mason and mason apprentice "vacancies". The combination of these practices left virtually no progression opportunities for the plaintiffs, while leaving intact the progression opportunities for white employees, in the mason department and other areas of the 11,000 employee plant.

Once liability had been established against both defendants, it became the duty of the District Court to make the victims "whole". The District Court insisted upon a reconstruction of gross employment or job "vacancies". It was essential to determine from what source that job history was to be developed. The district court did not consider the "jobs" and "work" performed by outside contractors when reconstructing the gross to determine the amount of money which plaintiffs could have earned from July 2, 1965 to the present. By excluding the "jobs" in the Youngstown plant and the "work" performed by the outside contractors, the District Court's reconstruction is a misapplication and a mockery of the Supreme Court's *Teamsters* decision, the purpose of Title VII, and the intent of Congress.

Plaintiffs submit that it is the "jobs" performed for the employer, (not merely "vacancies") translated into money which the plaintiffs should have earned and should have been paid, rather than the source of the performers of that work, that should be considered. Plaintiffs submit that the guidelines set forth in Title VII, in *Bowe,* and *Albermarle* should have been applied where there were sufficient jobs performed to have afforded promotional opportunities for plaintiffs, rather than misapplying *Teamsters* to determine the amount of back pay due plaintiffs.

II.

THE SEVENTH CIRCUIT'S DECISION AFFIRMING THE TRIAL COURT'S AWARD FOR BACK PAY AND ATTORNEY FEES CONFLICTS WITH THE SUPREME COURT DECISIONS AND TITLE VII WHICH MAKES TITLE VII COMPLAINANTS WHOLE AND COMPENSATES ATTORNEYS AS THEY ARE COMPENSATED IN COMPLEX FEDERAL CASES.

A. The Seventh Circuit Permitted The District Court To Enter An Award Of Back Pay Which Did Not Make Plaintiffs Whole.

In the instant case, the trial court awarded a gross pay award of $28,000.00 to be divided between the 55 plaintiffs. This $28,000 figure was based on the trial court's determination of the difference between the average earnings of the Plaintiffs and those of white employees who were assigned the opportunities to be mason apprentices which members of plaintiffs' class should have been assigned in order to have produced from 15 to 17% (SMSA) black employee participation in the vacancies. The trial court's formula translated into one vacancy for the 55 plaintiffs and back pay was to be computed from January 10, 1968 to February 10, 1974 with 8% per annum pre-judgment interest. Said award did not make the plaintiffs whole for the 14 years they were discriminated against by defendants. There had been enough outside contracting of mason work; hiring of outside masons; and employment opportunities in other areas of Youngstown's 11,000 employee plant to have provided equal advancement for each plaintiff to have been made whole.

The purpose of Title VII is to make persons "whole" for injuries suffered on account of unlawful employment discrimination. Title VII deals with legal injuries of an

economic character occasioned by racial or other anti-minority discrimination. *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Where racial discrimination is concerned, the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). Where a legal injury is of an economic character this Court has held:

> "(t)he general rule is, that when a wrong has been done and the law gives a remedy the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had been committed." *Wicker* v. *Hoppock,* 6 Wall. 94.99 (1867)

The "make whole" purpose of Title VII is made evident by the legislative history. The back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act. Under that Act, "making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1941); *Nathanson* v. *NLRB,* 344 U.S. 25 (1952); and *NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969). The Supreme Court stated in *Albermarle*:

> "The provisions of the subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the

> attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." (422 U.S. at 421).

Thus, it is clear in the present case that the 55 Plaintiffs were not made whole in accordance with *Albermarle, Bowe,* or Title VII. If the Court had followed *Albermarle,* and if the Court had compensated the 55 plaintiffs for the defendants' 14 years of discriminatory conduct, the abovementioned case would have dictated an award of $5,700,000.00.

B. The Seventh Circuit Permitted The District Court To Enter An Award Of Attorney's Fees To Plaintiff's Attorneys Which Was Contrary To Title VII.

The legislative history of 42 U.S.C. Sec. 2000-5 (k) reviewed and analyzed by House and Senate Reports in The Civil Rights Attorney's Fees Awards Act leaves no doubt as to the Congressional directives to the Federal Courts regarding the award of attorney's fees.

The Senate and House reports set out the standard to be utilized in determining appropriate attorney's fees in Title VII cases. The Senate Report states:

> "It is intended that the amount of fees awarded under § 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . . (S. Rep. at 6)"

The reason that attorney's fees in Title VII cases are the same as those in complex federal cases is because Congress has made a formal determination that the public

interest requires adequate attorney's fees in order to encourage private enforcement of the Civil Rights Law. As the Senate Report explains:

> ". . . . The Committee has found that fee awards are essential if the Federal Statutes . . . are to be fully enforced . . . that fee awards are an integral part of the remedies necessary to obtain such compliance.
>
> • • • •
>
> Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. *If our civil rights laws are not to become mere hollow pronouncements* which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." (S. Rep., 5-6) (Emphasis added)

Or, as the House Report States:

> "The effective enforcement of Federal Civil Rights Statutes depends largely on the efforts of private citizens. . . In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. *Unless the judicial remedy is full and complete,* it will remain a meaningless right. . ." (H. Rep. p.1.) (Emphasis added)

The purpose then of liberal attorney's fees here is not to punish Defendants, but, rather, to encourage other citizens to prosecute their legitimate constitutional grievances and thereby carry out the expressed will of Congress. The District Court did not follow 42 U.S.C Sec. 2000-5 (k) and the Civil Rights Attorney's Fees Awards Act when it awarded plaintiff's attorney attorneys' fees. The plaintiff's attorneys worked a total of 1769.95 hours (Honorable Marion Garnett worked 466 hours; Attorney Leroy

P. Vital worked 927.7 hours and Attorney Earl B. Williams worked 376.25 hours), and were paid $66,500.00 for their services. The District Court's award translates into an hourly rate of $37.57 per hour when attorneys in complex federal cases are paid a minimum of a $100.00 per hour with a multiplier in some cases. Therefore, if plaintiffs' attorneys had been paid the prevailing hourly rate in Chicago for complex federal litigation, they would have received no less than $176,995.00 with multiples of the aforementioned sum if a multiplier had been used by the Court. Consequently, if private attorneys are going to prosecute Title VII cases, and if our civil rights laws are not to become mere hollow pronouncements, then this Court must increase the plaintiff's attorneys fees in order to encourage private enforcement of the Act.

III.

THE SEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Seventh Circuit Permitted The District Court To Refuse To Pay Back-Pay to Plaintiffs even Though The District Court's Decision Conflicts With Supreme Court Decisions.

In the instant case, the trial court found Local 6, one of the Defendants in this case, guilty of violating the Plaintiffs' Title VII rights (by having apprenticeship and membership requirements which discriminated against Plaintiffs because of their race), but the trial court refused to award the Plaintiffs' back-pay. The Seventh Circuit held that the District Court acted within its

sound discretion under Title VII by awarding Plaintiffs injunctive and other affirmative relief. Moreover, the Seventh Circuit affirmed the district court's refusal to award Plaintiffs back-pay for the unlawful discriminatory practices of Local 6. The Plaintiffs submit that the lower courts erred and are asking this court of last resort to invoke its supervisory power and order the lower federal courts to follow *Albermarle Paper Co.* v. *Moody*, 422 U.S. 495 (1975).

In *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) this court delineated the standards governing back-pay awards in employment discrimination cases. The Albermarle court, relying on *Griggs* v. *Duke Power Co.* (1971), 401 U.S. 424, stated that the primary purpose of Title VII was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The *Albermarle* court stated that back-pay has an obvious connection with this purpose because employers (or unions) only faced with the prospect of an injunctive order would have little incentive to shun practices of dubious legality. The *Albermarle* court also stated that it is the reasonably certain prospect of a back-pay award that "provides the spur or catalyst which causes employers and unions (Local 6, herein) to self-examine and self-evaluate their employment practices and to endeavor to eliminate so far as possible, the last vestiges of an unfortunate and ignominious page in the country's history". *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). This court held in *Albermarle*, given a finding of unlawful discrimination, that back-pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating

discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Finally, in its holding, the *Albermarle* court insisted that courts of appeal maintain a consistent and principled application of the back-pay provision, consonant with the twin statutory objectives of Title VII. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 521-22 (1975).

The Seventh Circuit failed to follow *Albermarle* and, as a consequence, the plaintiffs were denied back-pay; plaintiffs have not achieved equality of employment opportunities in Local 6; and plaintiffs have suffered a legal injury economic in character and have not been made whole. See *Albermarle Paper Company* v. *Moody* 422 U.S. 405, 418-22 (1975). The District Court did award the Plaintiffs injunctive relief against Local 6. However, *Albermarle* teaches that an injunctive order does not provide an employer or union with the requisite incentive to shun practices of dubious legality. Moreover, *Albermarle* holds that back-pay should only be denied in special cases. In spite of *Albermarle*, the Seventh Circuit refused to reverse the district court which improperly exercised its discretion by denying plaintiff's back-pay against Local 6. Finally, if back pay is to be denied only for reasons which, according to *Albermarle*, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination, then the Seventh Circuit's decision must be reversed, otherwise, *stare decises* loses it meaning because this court will be sanctioning the Seventh Circuit's refusal to follow *Albermarle* by failing to grant certiorari in the instant case.

B. The Seventh Circuit Permitted the District Court To Act As An Appellate Court In Violation Of The Judiciary Act.

Article III, Section 1 of the United States Constitution vests the judicial power of the United States in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. Congress has promulgated the Judiciary Act, and this statute has empowered the courts of appeals with jurisdiction to review all final decisions of the district courts of the United States, except where direct review may be had in the Supreme Court. 28 U.S.C. §1291. In the instant case, the Supreme Court should note that the Judiciary Act (28 U.S.C. §1291) was not followed by the District Court. On November 14, 1972, Judge George Beamer, a District Court Judge, entered an order defining the scope of the litigation in the case at bar. Five years later (on March 3, 1977), another District Court Judge, Judge Shape, on a Motion for Partial Summary Judgment filed by the Defendants, Youngstown, reversed Judge Beamer's order by limiting the scope of this litigation. The Seventh Circuit sanctioned this deviation by the trial court from the Judiciary Act by not reversing the District Court's decision. Plaintiffs ask this court to invoke its supervisory power and reverse the Seventh Circuit's decision since the circuit court and the trial court have departed from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons set out above, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 80-1983, 80-2027, and 80-2028

HORACE L. PATTERSON, et al.,
Plaintiffs, Appellants-Appellees,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY, and LOCAL 6, BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,
Defendants, Appellees-Appellants.

Appeals from the United States District Court for the Northern District of Indiana.
No. 79-C-301—ALLEN SHARP, *Judge.*

ARGUED MARCH 30, 1981—DECIDED JULY 20, 1981.*

Before CUMMINGS, *Chief Judge,* GIBSON, *Senior Circuit Judge,*** and BAUER, *Circuit Judge.*

* This appeal was originally decided by unreported order on July 20, 1981. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion because the panel granted the joint motion to publish.

** The Honorable Floyd R. Gibson, Senior Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

GIBSON, *Senior Circuit Judge*. This suit, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is based upon EEOC charges which were filed on September 21, 1969. Those charges were filed against Youngstown Sheet and Tube Company (Youngstown) and Local 6, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Local 6) by employees of Youngstown employed as mason-helpers at Youngstown's Indiana Harbor Works facility. All mason-helpers at Youngstown, at the time of the complaint, were black males. They alleged that because of their race they were denied the opportunity to move from the position of mason-helper to that of brick mason. Mason-helpers are members of the United Steelworkers of America, Local 1011 collective bargaining unit (United Steelworkers). Brick masons and brick mason apprentices are represented by Local 6.

On October 22, 1971, ten individual plaintiffs filed their complaint in federal court, alleging violations of Title VII. The action was certified as a class action on November 4, 1972. It was brought on behalf of "• • • black employees of [Youngstown] who are employed as masons' helpers and who have so been employed on or since July 2, 1964 or enjoyed right of recall as of that date."

On May 12, 1977, the district court granted a motion for partial summary judgment for Youngstown, on the grounds that certain claims which plaintiffs sought to litigate (1) were beyond the scope of the suit which could properly be based upon the underlying EEOC charges, and (2) would involve an indispensable party (the United Steelworkers) which had not been charged before the EEOC and could not be made a party to the suit. As a result of this partial summary judgment, the sole remaining issue in the case was whether Youngstown and/or Local 6 denied the mason helpers the opportunity to move to the position of brick mason or brick mason apprentice because of their race.

On August 12, 1977, the court again entered an order for partial summary judgment, this time for plaintiffs. The court found that Youngstown

> was in violation of 42 U.S.C. §§ 2000e et seq. ("Title VII"), for the period of 2 July 1965 — 21 September 1969, as it denied Plaintiffs the opportunity to move from the position of mason helper to that of brickmason or brickmason apprentice because of Plaintiffs' race.

A three-day trial was held in March 1979. Subsequently the court issued its decree and held that

> Local 6's requirements for apprenticeship and admission into membership as apprentices that applicants must be less than 22 years of age (or 24 with military service credit) and have a high school education or GED, as well as its stated preference for sons of members, [were] in violation of Title VII and unlawful.

However, the court also held that "Local 6's unlawful requirements and practices did not rise to such level as, within the Court's sound discretion under Section 706(g) of Title VII * * *, Local 6 should be held liable for any back pay herein."

In addition, the court's decree formalized earlier pronouncements, set forth a formula for a magistrate to follow in determining back pay against Youngstown, entered injunctive relief against both defendants, and deferred a ruling on the amount of attorney fees to be assessed against Youngstown.

On May 7, 1980, the district court entered an order adopting the magistrate's report and recommendations, which awarded $28,382.77 to plaintiffs. Subsequently, it assessed approximately $66,000 in attorney fees against the employer for four of plaintiffs' attorneys.

On appeal, the appellants/cross-appellees mason-helpers assign as error (1) the district court's computation of the

back pay awarded, (2) the district court's computation of attorney fees awarded, and (3) the finding that Local 6 is not liable for back pay or attorney fees. Youngstown has cross-appealed, assigning as error the entry of summary judgment on the issue of its liability. We affirm the judgment of the district court.

Appellants, cross-appellees Patterson et al. (plaintiffs) have moved to strike Youngstown's cross-appeal on the ground that the point of error urged here, namely, that summary judgment was inappropriate on the issue of liability, was never presented to the district court in a manner whereby the court could rule on it. At the time the court entered its order for partial summary judgment on the issue of liability, its order was interlocutory and hence non-appealable. It did not become appealable until final judgment was entered on July 17, 1979. Youngstown was under no duty to make any post-trial motions in order to reserve the right to appeal the judgment entered against it. Plaintiffs motion to strike Youngstown's cross-appeal is denied along with plaintiffs' motion for an order directing payment of back pay and attorney fees as partial back pay and costs.

Back Pay Award

The district court properly based its back pay award upon the vacancies which occurred, during the relevant period, in Youngstown's brick mason department only. The EEOC charges filed by plaintiffs confined the allegations of discrimination to the brick mason department. In addition, the only union named in the EEOC charges was the union which represents employees in the brick mason department, Local 6. The Steelworkers Union represents employees in the departments which plaintiffs later hoped to include in the computation of back pay. However, plaintiffs did not name the Steelworkers in their EEOC charges or in their complaint, and never attempted to join the Steelworkers as a party defendant. The court properly applied the correct standard in determining that "the allegations of the complaint which re-

late[d] to promotion and transfer within the Steelworkers bargaining unit [were] not properly within the scope of a judicial complaint based upon Plaintiffs' EEOC charges." The court did not abuse its discretion when it found that such allegations were not "like or reasonably related to" the charges made before the EEOC. *See Danner* v. *Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971).

Plaintiffs also urge that the court erred in its computation of back pay by excluding evidence of the fact that Youngstown on occasion contracted with outside companies to perform construction work, including brick-masonry, at its plant. Plaintiffs argue that they were prejudiced by this exclusion insofar as they were not allowed to show the "actual historical vacancies during the relevant time period." We disagree.

Firstly, Youngstown's practice of "contracting out" was not disputed on the record. Therefore, plaintiffs were not prejudiced by not being allowed to prove that the practice existed. Secondly, we know of no authority for the proposition that employees of independent contractors should be deemed employees of the defendant employer for purposes of back pay liability under Title VII. The "contracting out" of masonry work was commonplace in the industry, and Youngstown was under no duty to use own mason workers when possible rather than to subcontract the work. As the Supreme Court stated in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577-78 (1977), "Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

Plaintiffs contend that the wrong time period was used in computing their back pay. They urge that the court should have gone back to July 2, 1965, in finding liability, and that it should have continued the back pay liability until the present because "class members have

not attained their 'rightful place' even today." In fashioning the time period for which back pay was to be awarded, the court selected as its beginning date the date of "the earliest apprentice hiring [after 1976] which occurred • • • [on] January 10, 1968." Youngstown urges that the period should begin on a date two years prior to the date plaintiffs filed their EEOC charges.

The court found that

> the back pay award would be the same in this case regardless of which beginning date for computation were chosen. The Court has determined that only one more black placement would have achieved over 16% (or even 17%) of total black placements as apprentices in the 4 years between 1965 and 1969. [The court had found that in the absence of discrimination, black employees would have received approximately between 15% and 17% of the job vacancies.] One black apprentice was hired during the first 2 years (in 1966) and the next would most likely not have been hired until the latter 2 year period. Given that complete precision as to the probable date of hire cannot be achieved, the Court hereby resolves the issue in favor of Plaintiffs by selecting as the vacancy computation date the earliest apprentice hiring which occurred within the latter 2 year period—that is, January 10, 1968.

42 U.S.C. § 2000e-5(g) provides in part: "Back pay liability shall not accrue from a date more than two years prior to the filing of the charge with the Commission." This provision does not limit the availability of back pay but it does limit the extent to which that remedy may be afforded. *See, e.g., Miller* v. *Miami Prefabricators, Inc.*, 438 F. Supp. 176, 181 (S.D.Fla. 1977). "Under Title VII back pay liability exists only for practices occurring after the effective date of the Act, July 2, 1965, and accrues only from a date two years prior to the filing of a charge with the EEOC." *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 410 n.3 (1974). The district

court scrupulously analyzed the facts of this case in the context of Title VII's two-year back pay limitation. It concluded that the beginning date for computation of back pay would not affect the award. This ruling, rather than being "clearly erroneous," was well-reasoned and correct, and we uphold the court's determination on the issue.

We find the date chosen as the ending date for the back pay award to be equally correct. The court held that "as a matter of law and within the Court's sound discretion the period over which back pay is to be computed is 10 January 1968 — 10 February 1974 when Plaintiffs' class members actually were afforded the opportunity to become mason apprentices." The court found that in early February 1974, Youngstown afforded, to the six most senior members of plaintiffs' class who applied, the opportunity to become mason apprentices. It ruled that such placements corrected the earlier denials of jobs for which Youngstown had been found liable. The court's ruling on this issue does not constitute an abuse of discretion under Title VII.

Attorney Fees

Plaintiffs assign as error the district court's method of computing their award of attorney fees under section 706k of Title VII, 42 U.S.C. § 2000e-5(k). They submit that the court abused its discretion in awarding plaintiffs' attorneys only $57,500 in fees. We cannot agree.

The court, in its memorandum of May 30, 1980, set forth its findings and conclusions in regard to the allowance of counsel fees. In the memorandum, the court properly asserts ts broad discretion in this area and then goes on to explain and support its findings in some detail. The court found that

> plaintiffs [did not prevail] against Youngstown on any matter other than a motion for summary judgment as to liability covering a single employment practice. Th[e] Court's entry of partial summary judgment in favor of Youngstown on May 12, 1977

> disposed of plaintiff's [*sic*] liabiity with respect to many other employment practice[s] affecting the more than 8,000 persons in the United Steelworkers bargaining unit at Youngstown, as compared to the single employment practice involving 55 members of the class represented by plaintiffs.

The court delineated several "serious deficiencies" in the record offered to justify the amount of fees requested by plaintiffs' counsel.

We find that the fees awarded in this case were proper. The court's memorandum is well-reasoned and supported, and its conclusions evidence no abuse of discretion.

Findings Regarding Local 6

Finally, plaintiffs urge that they should have been awarded back pay and attorney fees from Local 6. The district court found that Local 6's requirements for apprenticeship and admission into membership were in violation of Title VII. However, the court also found that there was not a sufficient nexus between Local 6's behavior and the injuries suffered by plaintiffs to hold Local 6 liable for back pay. *See Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 848 (5th Cir. 1977), certiorari dismissed, 434 U.S. 871; 42 U.S.C. § 2000e-5(g).

There is sufficient evidence in the record before us to determine that these findings were neither clearly erroneous nor inconsistent with each other. The district court acted within its sound discretion under section 706(g) of Title VII in holding Local 6 liable for "injunctive and other affirmative relief to correct the effects of its unlawful practices, but not for back pay."

For the foregoing reasons, the judgment of the district court is, in all respects, *affirmed.*

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Opposition

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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-747

HORACE L. PATTERSON, *et al,*

Petitioners,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY and LOCAL 6, BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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RESPONDENT UNION'S BRIEF IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Notwithstanding this Court's decision in *Furnco* on hiring procedures, the Seventh Circuit's expressed and actual reliance upon that ruling in *Furnco* and Title VII's prohibition against punitive damages, should Petitioners' petition for certiorari still be granted when the Seventh Circuit's decision is not in conflict with a decision of any other Circuit Court of Appeals, does not present a new question of law and does not depart from the accepted and usual course of judicial proceedings? Indeed this decision follows the controlling rulings of this Court.

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CITATION TO OPINIONS BELOW

The opinion of the District Court appears at 475 F. Supp. 344 (D.C. N.D. Ind., 1979). The Court of Appeals for the Seventh Circuit affirmed the District Court's opinion (Case Nos. 80-1983, 80-2027, 80-2028). It is as yet unpublished in the Federal Reporter.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1981. Petitioners state that the jurisdiction of this Court is based upon 28 U.S.C. § 1254(1). The original jurisdiction of the District Court was based solely upon 42 U.S.C. § 2000e, *et seq.*, of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Respondent Local 6, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, ("Union" or "Local 6") submits this Brief in opposition to Petitioners' (or "Plaintiffs") petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

The Decision of the Court of Appeals for the Seventh Circuit provides an excellent statement of the case and accordingly, for the convenience of the Court, we adopt it, in relevant part, herein: "This suit, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is based upon EEOC charges which were filed on September 21, 1969. Those charges were filed against Youngstown Sheet and Tube Company (Youngstown) and Local 6 by employees of Youngstown employed as mason-

helpers at Youngstown's Indiana Harbor Works facility. All Mason-helpers at Youngstown, at the time of the complaint, were black males. They alleged that because of their race they were denied the opportunity to move from the position of mason-helper to that of brick mason. Mason-helpers are members of the United Steelworkers of America, Local 1011 collective bargaining unit (United Steelworkers). Brick masons and brick mason apprentices are represented by Local 6.

"On October 22, 1971, ten individual plaintiffs filed their complaint in federal court, alleging violations of Title VII. The action was certified as a class action on November 4, 1972. It was brought on behalf of * * * black employees of [Youngstown] who are employed as masons' helpers and who have so been employed on or since July 2, 1964 or enjoyed right of recall as of that date.'"[1]

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1. During the pendency of this suit, the United States District Court for the Northern District of Alabama entered Consent Decrees I and II in the case of *United States* v. *Allegheny-Ludlum Industries Inc.*, Civil Action No. 74P339. Those Decrees covered all employees, represented by Steelworkers Local 1011, employed at Youngstown's Indiana Harbor Works, including all of the members of Plaintiffs' class here, as well as tens of thousands of other steelworkers throughout the United States. It should be noted that Bricklayers Union Local 6, representing other employees in a different bargaining unit was not involved or affected by such litigation. The Steelworker Decrees provided the systemic relief necessary to resolve all issues relating to acts and practices of discrimination at many employers, including Youngstown, and determined that

(Footnote continued on next page)

"On May 12, 1977, the district court granted a motion for partial summary judgment for Youngstown, on the grounds that certain claims which plaintiffs sought to litigate (1) were beyond the scope of the suit which could properly be based upon the underlying EEOC charges, and (2) would involve an indispensable party (the United Steelworkers) which had not been charged before the EEOC and could not be made a party to the suit. As a result of this partial summary judgment, the sole remaining issue in the case was whether Youngstown and/or Local 6 denied the mason-helpers the opportunity to move to the position of brick mason or brick mason apprentice because of their race.

"On August 12, 1977, the court again entered an order for partial summary judgment, this time for plaintiffs (Plaintiffs were seeking summary judgment only against Youngstown). The court found that Youngstown

> was in violation of 42 U.S.C. §§2000e *et seq.* ("Title VII"), for the period of 2 July 1965 – 21 September 1969, as it denied Plaintiffs the opportunity to move from the position of mason helper to that of brick-

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(Footnote continued from preceding page)

compliance with their terms is compliance with Title VII and satisfies any requirement for affirmative action. The Decrees found unwarranted any relief other than back pay which might be awarded in any other action or proceeding that would add to or be inconsistent with the systemic relief provided. Consent Decree I provided for award of back pay to various "minority" and female employees. All but the 55 members of Plaintiffs' class accepted such back pay awards and released Youngstown from any further liability.

> mason or brickmason apprentice because of Plaintiffs' race.'"

"A three-day trial was held in March 1979. Subsequently the court issued its (July 17, 1979) decree and held that

> Local 6's requirements for apprenticeship and admission into membership as apprentices that applicants must be less than 22 years of age (or 24 with military service credit) and have a high school education or GED, as well as its stated preference for sons of members, [were] in violation of Title VII and unlawful.

However, the court also held that "Local 6's unlawful requirements and practices did not rise to such level as, within the Court's sound discretion under Section 706(g) of Title VII * * *, Local 6 should be held liable for any back pay herein."

"The court's (July 17, 1979) decree formalized earlier pronouncements made at the trial, set forth a formula for a magistrate to follow in determining back pay against

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2. Thereafter, Plaintiffs and Local 6 each filed a motion for summary judgment on the issue of the Bricklayers Union's liability. On February 7, 1979, the District Court denied cross motions for summary judgment by the Plaintiffs and the Union. The basis for this decision was ". . . in light of the defendant, Local 6's, assertion that the company was vested with exclusive control of hiring and the plaintiffs' counter assertion of discriminatory practices, specifically but not limited to the ones alleged in the Leonard (Employer Mason Superintendent) affidavit and the attendant case law, this Court holds that there is an issue of material fact pursuant to Rule 56 of the Federal Rules of Civil Procedure. Accordingly, . . . (the) motion for summary judgment are each and in all things DENIED." (District Court slip opinion, p. 7)

Youngstown, entered injunctive relief against both Defendants and deferred a ruling on the amount of attorney fees to be assessed against Youngstown. More specifically, the District Court's Decree's findings of fact[3] were, *inter alia,* that the Employer "had the sole and exclusive right to hire mason apprentices and masons (see particularly

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3. After hearing Plaintiffs' evidence and the parties' oral arguments, the District Court made tentative findings and conclusions of law. Citing and explaining in detail the holding in *Myers* v. *Gilman Paper Corporation,* 544 F. 2d 837, 848 (C. A. 5, 1977), *modified on rehearing on other grounds,* 556 F. 2d 758 (C.A. 5, 1977), *cert. den.,* 434 U.S. 801 (1977), the District Court held that Plaintiffs did not establish a sufficient nexus between the Bricklayer Union's conduct and the injuries for which back pay was sought (Trial Transcript 458-459, 461-462). Accordingly, the District Court said that "the union motion (at trial) (to deny damages) is granted, and I use money damages in the broad sense, as far as any injunctive and declaratory relief is concerned." (Trial Transcript 463). The District Court went on to find that Local 6's constitutional provisions concerning age, education and family preference were illegal (Trial Transcript 461), but "those findings, as interesting as they are and perhaps as satisfying as they may be, do not really get . . . to the final bottom line, as far as the injuries (suffered by the Plaintiffs) . . ." (Trial Transcript 461). ". . . (T)he three items that I have mentioned are officially violative of Title Seven . . ." (Trial Transcript 463). "I'm going to leave the union in (the case), because I think the union must be bound by this Court's findings and this Court's determination" (Trial Transcript 462-463). Finally, the District Court stated that "I don't think . . . this Court is going to be persuaded to assess attorneys' fees against the union, I can't say that as to the company. That's not a final decision, that's just a comment . . ." (Trial Transcript 462).

Local 6, Exhibits A, B and Tr. pg. 247)" (Decree slip opinion, pg. 5, para. 5); ". . . Youngstown had no relationship whatsoever to the Joint Apprenticeship Committee and Program operated by Defendant Local 6 and the Masons Contractors Association of Northwestern Indiana, Inc. (see also Union Exhibits E, F)" (Decree slip opinion, pg. 6, para. 6); Plaintiffs were members of the Steelworkers Local 1011 bargaining unit and not of Local 6 (Decree slip opinion, pg. 1); and, that age, education and family preference requirements and provisions existed for membership of mason apprentices in Local 6 (Decree slip opinion, pgs. 6-7, paras. 8-9). The District Court then concluded as a matter of law, "as it also ruled at time of trial and now restates," that there was not a genuine nexus of a sufficient connection between the Employer's conduct and Local 6's requirements which "within the Court's sound discretion under Section 706(g) of Title VII and in light of the authorities cited . . . (so that) Local 6 should be held liable for any back pay herein. The Court thus holds that Local 6 is liable for injunctive and other affirmative relief to correct the effects of its unlawful practices, but not for back pay." (Decree slip opinion, pgs. 13-15, paras. 3-6).

"On May 7, 1980, the district court entered an order adopting the magistrate's report and recommendations, which awarded $28,382.77 to plaintiffs. Subsequently, it assessed approximately $66,000 in attorney fees against the employer for four of plaintiffs' attorneys. On appeal (filed on July 27, 1980), (Plaintiffs) . . . assign(ed) as error (1) the district court's computation of the back pay awarded, (2) the district court's computation of the attorney fees awarded, and (3) the finding that Local 6 (was) not liable for back pay or attorney fees. (On July 11, 1980,)

Youngstown . . . filed a cross-appeal (against the Plaintiffs, *only*) assigning as error the entry of summary judgment on the issue of its liability." After considering the briefs and hearing oral argument on March 30, 1981, the Seventh Circuit, on July 20, 1981, affirmed the judgment of the district court. On October 16, 1981, Plaintiffs filed their petition for a writ of certiorari to which this Brief is in opposition.

SUMMARY OF ARGUMENT

Plaintiffs' petition presents no basis for the granting of certiorari. The Seventh Circuit's order follows the decisional law of this Court, *e.g. Furnco,*[4] *Teamsters*[5] and *Franks*[6] and fulfills and satisfies the purposes of Title VII. The instant case neither presents a question which has been resolved in conflict with a decision by another Court of Appeals nor does it include a novel legal question or a judicial transgression. The Court of Appeals for the Seventh Circuit simply found that "(t)here is sufficient evidence in the record before us to determine that these findings ["there was not a sufficient nexus between Local 6's behavior and the injuries suffered by plaintiffs to hold Local 6 liable for back pay"] were neither clearly erroneous nor inconsistent with each other. The district court acted within its sound discretion under section 706(g) of

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4. *Furnco Construction Corporation* v. *Waters,* 438 U.S. 567 (1978).

5. *Teamsters* v. *United States,* 431 U.S. 324 (1977).

6. *Franks* v. *Bowman Transportation Company, Inc.,* 424 U.S. 747 (1976).

Title VII in holding Local 6 liable for 'injunctive and other affirmative relief to correct the effects of its unlawful practices, but not for back pay'."[7] The Seventh Circuit's make whole remedy properly followed the controlling dictates of this Court's decision in *Teamsters, supra,* and *Franks, supra,* which require that in fashioning a make whole remedy job vacancies must exist in actuality and properly followed this Court's decision in *Furnco, supra,* to the effect that Title VII does not impose a duty to adopt hiring practices which maximize minority hiring. Similarly, the Court of Appeals acted properly and within its discretion in its attorneys' fees award to Plaintiffs' counsel who prevailed only on one limited aspect of their case and who submitted petitions for fees which included "serious deficiencies."

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7. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides, "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, *responsible for the unlawful employment practice*), or any other equitable relief as the court deems appropriate." (Italics supplied).

ARGUMENT

THE PETITION FOR CERTIORARI MUST BE DENIED BECAUSE THE SEVENTH CIRCUIT'S DECISION IS NOT ONLY JUST AND PROPER, BUT IT ALSO DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT, RESOLVE A NEW QUESTION OF LAW OR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS. INDEED THIS DECISION FOLLOWS TITLE VII AND THIS COURT'S CONTROLLING DECISIONS.

Apportionment: An Accepted Doctrine

Misunderstanding or twisting the law, Plaintiffs apparently believe that by appealing the Seventh Circuit's decision not to apportion any damages and attorneys' fees against Local 6 that they can, in fact, increase the amount of those awards. They cannot. Punitive damages are not available under Title VII. *Albermarle Paper Company* v. *Moody*, 422 U.S. 405 (1975). Plaintiffs were made whole monetarily. A specific formula guaranteeing a make whole result was recommended by a magistrate, approved and adopted by the District Court and affirmed upon appeal by the Seventh Circuit. Irrespective of the formula adopted —that issue is separate and apart from the allocation of the monetary award wherein the Court of Appeals found that the District Court, with record support, properly acted within its allowable discretion and its decision was not clearly erroneous.

The Court of Appeals considered and adopted the findings of fact made by the District Court—facts which are

not contested by Plaintiffs. The Seventh Circuit recognized the nexus requirement[8] explained and applied in the Fifth Circuit's decision in *Myers* v. *Gilman Paper Corporation*, 544 F. 2d 837, 848 (C.A. 5, 1977),[9] *modified on rehearing on other grounds*, 556 F. 2d 758 (C.A. 5, 1977), *cert den*, 434 U.S. 801 (1977), which reflected the Congressional intent that back pay may be awarded against those "*responsible for the unlawful employment practice.*" Section 706(g), 42 U.S.C. § 2000e-5g.[10] In the instant matter there was no abuse of the court's "traditional discretion to locate a 'just result'." Local 6 had injunctive relief entered against it. Plaintiffs have been made whole. *Albermarle Paper Company* v. *Moody*, 422 U.S. 405 (1975). The issue of appointment of backpay and attorneys' fees[11] has no impact on being made whole.

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8. See also, *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309 (C.A. 7, 1974).

9. Earlier Fifth Circuit decisions include *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641 (C.A. 5, 1974); *U.S.* v. *Georgia Power Co.*, 474 F. 2d 906 (C.A. 5, 1973); and *Jinks* v. *Mays*, 464 F. 2d 1223 (C.A. 5, 1972).

10. See also, *EEOC* v. *Enterprise Steamfitters, Local 638*, 542 F. 2d 579 (C.A. 2, 1976), *cert den.*, 430 U.S. 911 (1977), and *U.S.* v. *N.L. Industries, Inc.*, 479 F. 2d 354 (C.A. 8, 1973).

11. The issue of the sufficiency of Plaintiffs' attorneys' fees really requires only the comment that Plaintiffs were successful only in a small part of the case which they attempted to bring and, as the lower courts noted, their petitions for fees contained "serious deficiencies" which need not be re-exposed at this time.

Backpay

Backpay cannot be awarded for jobs which did not in actuality exist. This Court has repeatedly taken this position in such cases as *Franks* v. *Bowman Transportation Company, Inc.*, 424 U.S. 747, 773, fn. 32 (1976), and in *Teamsters* v. *United States*, 431 U.S. 324, 372 (1977), wherein this Court said that on remand the district court "will be required to balance the equities of each minority employee situation *in allocating the limited number of vacancies* that were discriminatorily refused to class members." (Italics supplied). Similarly, a company's traditional business practice of subcontracting need not be eliminated or modified merely to create additional in-house jobs for minorities. As this Court said in *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 577-578 (1978), Title VII "... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." In other words, subcontracting in itself is not illegal and does not act to create vacancies within the employer's own ranks. The requirement of actual vacancies follows—rather than conflicts with the holding in—*Albermarle*, 422 U.S. 405, 421 (1975), that it is the duty of the courts in Title VII cases to render a decree which will so far as possible eliminate the discriminatory effects of the past. And this was the same principle recognized and followed by the Seventh Circuit in this case.[12]

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12. Plaintiffs resort to an argument of an alleged violation of Article III, Section 1 of the United States Constitution by the lower court herein (Petition pg. 17) which requires no comment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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No. 81-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HORACE L. PATTERSON, et al.,

Petitioners,

VS.

YOUNGSTOWN SHEET AND TUBE COMPANY and LOCAL 6, BRICKLAYERS, MASONS AND PLASTERERS INTERNATIONAL UNION OF AMERICA, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT YOUNGSTOWN SHEET AND TUBE COMPANY'S BRIEF IN OPPOSITION

Petitioners ask this Court to reconsider a decision of the United States Court of Appeals for the Seventh Circuit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), which held that the District Court properly based its back pay award against Respondent Youngstown Sheet and Tube Company

("Youngstown")* upon an historical reconstruction of job vacancies, properly computed and explained its award of attorneys' fees against Respondent Youngstown, and entered appropriate remedies for the violation of Title VII found against Respondent Local 6, Bricklayers, Masons and Plasterers International Union of America, AFL-CIO ("Local 6"). That Seventh Circuit decision is consistent with all existing case law and is mandated by prior decisions of this Court. Before discussing the factors which make *certiorari* inappropriate, it is necessary to set forth certain record facts.

STATEMENT OF THE CASE

Petitioners' suit before the District Court was filed on October 22, 1971 under Title VII by ten individuals who sought to bring their claim as a class action (R. 1).**

On November 4, 1972, the District Court (Honorable George N. Beamer) ruled that the suit could proceed as a class action under Federal Rule of Civil Procedure 23(a) and (b)(2) and (3) on behalf of ". . . black employees of [Youngstown] who are employed as masons' helpers and

* Effective June 22, 1981, Youngstown Sheet and Tube Company, an Ohio corporation, and Jones & Laughlin Steel Corporation, a Pennsylvania corporation, were merged with and into Jones & Laughlin Steel Incorporated, a Delaware corporation, which is a wholly-owned subsidiary of The LTV Corporation, a Delaware corporation.

** References to "A. " are to pages of the Appendix filed with Petitioners' brief in the Seventh Circuit. References to "Supp. App. " are to pages of the Supplemental Appendix filed with Respondent Youngstown's brief below. References to "R. " are to documents in the Original Transcript of Record filed with the Clerk of the Seventh Circuit which were not included in the Appendices.

who have so been employed on or since July 2, 1965 or enjoyed right of recall as of that date" (A. 26).

On March 3, 1977, following several years of discovery, Respondent Youngstown filed a motion for partial summary judgment because certain issues which Petitioners sought to pursue for trial were beyond the proper scope of a suit based upon their underlying EEOC charges and, if allowed to be tried, necessarily would involve an indispensable party (the United Steelworkers of America, AFL-CIO-CLC) which was the collective bargaining representative for all production and maintenance employees except brickmasons, but which had not been charged before the EEOC and could not be made a party to the suit (R. 159).

On March 11, 1977, Petitioners filed a "motion for summary judgment as to liability against defendant company [Youngstown]" (R. 162).

The District Court* granted both parties' motions for partial summary judgment. The District Court held that

> the complaint is hereby limited to the issue of whether Defendant Youngstown and/or Defendant Local 6 denied Plaintiffs the opportunity to move from the position of mason helper to that of brickmason or brickmason apprentice because of Plaintiffs' race (Supp. App. E).

The District Court also held that Respondent Youngstown

> was in violation of 42 U.S.C. §§ 2000e et seq. ("Title VII"), for the period of 2 July 1965—21 September 1969, as it denied Plaintiffs the opportunity to move from the position of mason helper to that of brickmason or brickmason apprentice because of Plaintiffs' race (Supp. App. C).

* The Honorable George N. Beamer had suffered an extended illness and died on October 21, 1974. The Honorable Allen Sharp had assumed responsibility for the case in November, 1973.

On February 7, 1979, the District Court denied cross-motions for summary judgment filed by Petitioners and Respondent Local 6 (R. 197, 219), and reserved for trial whether Respondent Local 6 had engaged in practices which denied Petitioners the opportunity to become brickmason apprentices because of their race (R. 234), as well as the appropriate relief to be awarded Petitioners based upon the District Court's previous finding of liability against Youngstown (R. 236, 238).

Following conclusion of the trial on March 23, 1979, the District Court entered its Findings of Fact, Conclusions of Law and Remedial Order (Supp. App. D). Among other things, the Order contained a finding of liability and several remedial provisions against Respondent Local 6, set forth a formula for computation of a back pay award against Respondent Youngstown, and directed the United States Magistrate to hold all necessary hearings in order to determine the dollar amount of back pay to be awarded Petitioners' class and the individual members thereof. The District Court subsequently adopted the Magistrate's recommended findings and conclusions and entered judgment in accordance therewith (Supp. App. G).*

Petitioners filed a "motion for new trial as to back pay" (R. 305), and their attorneys presented petitions for fees (R. 292, 299, 303). The District Court denied Petitioners' motion (Supp. App. A) and entered an order, a supplemental order and a memorandum opinion awarding fees to Petitioners' attorneys (Supp. App. B, H).

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* Petitioners repeatedly misrepresent that the back pay award covered a period of 14 years of discrimination (Petition pp. 1, 10, 14). The award on its face is based upon the reconstruction of events which occurred over the four-year period of liability found by the District Court (Supp. App. D, G).

Petitioners appealed to the Seventh Circuit from the District Court's orders denying them a new trial for back pay and awarding them attorneys' fees. Respondents Youngstown and Local 6 cross-appealed from the respective findings of liability against them.

On July 20, 1981, the Seventh Circuit affirmed the District Court on all issues.*

REASONS FOR DENYING THE WRIT

A. The Decision Below Is Consistent With All Existing Title VII Case Law

1. The Back Pay Award Expressly Follows This Court's Decisions

Petitioners have urged that the Seventh Circuit failed to follow this Court's ruling in *Albemarle Paper Co.* v. *Moody*,

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* Petitioners also misstate numerous record facts which are not material to this Court's denial of their petition but which could be grossly misleading. For example, Petitioners assert that "EEOC repeatedly sought leave to intervene but was thrice denied" (Petition p. 5). This simply is untrue. EEOC sought to intervene only on September 5, 1973 (R. 28) and was denied intervention on January 11, 1974 (R. 35). Moreover, EEOC on February 11, 1976 entered a special appearance to advise that Consent Decree I, *United States, et al.* v. *Allegheny-Ludlum Industries, Inc., et al.*, Civil Action No. 74P339 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom. Nat'l Organization for Women, Inc.* v. *Allegheny-Ludlum Industries, Inc., et al.*, and *Harris, et al.* v. *Allegheny-Ludlum Industries, et al.*, 425 U.S. 944 (1976), had resolved all issues concerning the production and maintenance bargaining unit represented by the United Steelworkers of America, and no additional or inconsistent relief could or should be awarded (R. 115, 116).

Further, Petitioners assert that "from 1952 to the effective date of Title VII, there was admitted intentional discrimination against [Petitioners] by Youngstown" (Petition pp. 4, 8). Again, this simply is untrue. Youngstown never admitted to any discrimination.

422 U.S. 405 (1975), that Petitioners should be awarded that amount of back pay which will "make them whole" for all losses suffered as the result of the violation found. Petitioners' concept of being made "whole" is that *each* of the 55 members of their class should be paid as if he had been a mason apprentice or mason from the effective date of Title VII to the date of judgment, without regard for the actual hiring by Youngstown during that time.

Respondent Youngstown submits that Petitioners' argument is specious on its face. As held by the Seventh Circuit, the District Court followed precisely this Court's decisions when it entered the Findings of Fact, Conclusions of Law and Remedial Order which established Petitioners' back pay formula (Supp. App. D). The District Court thus ruled in revelant part:

> One of the purposes of Title VII is to make persons whole for injuries suffered on account of unlawful discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Therefore, the Court should award to Plaintiffs as backpay a sum equal to the difference between what they actually earned during the relevant period and what they would have earned absent the unlawful discrimination. See, *e.g.*, *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).
>
> • • •
>
> Moreover, the Supreme Court of the United States and various Courts of Appeals have established that backpay awards under Title VII are to be based upon the actual historical vacancies occurring during the relevant period of time. In *Teamsters* v. *United States*, 431 U.S. 324 (1977), the Supreme Court stated that in fashioning a remedy:
>
> > the court must, as nearly as possible, "recreate the conditions and relationships that would have been

> had there been no" unlawful discrimination. Franks [v. Bowman Transp. Co.] supra, 424 US at 769; 47 L Ed 2d 444, 96 S Ct 1251. This process of recreating the past will necessarily involve a degree of approximation and imprecision. Because the class of victims may include some who did not apply for line-driver jobs as well as those who did, and because more than one minority employee may have been denied each line-driver vacancy, the court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members. (431 U.S. at 372)
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> • • •
>
> The uncontroverted historical reconstruction of actual mason apprentice vacancies at Youngstown's Indiana Harbor Works occurring between 2 July 1965 and 21 September 1969 . . . shows that 1 of 11 or approximately 9% of the apprentice opportunities went to blacks. In the absence of discrimination in violation of Title VII, black employees presumably would have received between approximately 15% and 17% of those job vacancies . . .

The District Court also expressly relied upon and followed an additional Seventh Circuit decision, *Stewart* v. *General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977), as well as decisions of the Fourth and Fifth Circuits in *United Transp. Union, Local 974* v. *Norfolk & Western R.R. Co.*, 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), and *United States* v. *United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976). In addition, see, *e.g.*, *Hameed* v. *Iron Workers, Local 396*, 637 F.2d 506 (8th Cir. 1980), and *White* v. *Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir. 1977), where the Circuit Court stated in part (564 F.2d at 1087):

> . . . White and his fellow eligible employees were damaged by their loss of opportunity to work in the con-

> verter room because of their race. From the state of the record, we cannot ascertain that there was more than one vacancy between 1967 and 1975. If there were more, damages, of course, should be increased according to a like computation. We do not imply that damages should be awarded for a year prior to that in which the vacancy existed.
>
> This method of computing damages requires the company to pay for depriving the eligible black employees of an opportunity to seek each job for which they were qualified, but not for jobs for which they were not eligible and not for vacancies which did not exist during the applicable time period.

Petitioners' assertion that certain work which was "contracted out" to other companies by Respondent Youngstown should be "a consideration for back pay" (Petition p. 7) lacks both legal foundation and logic. Petitioners never alleged before the EEOC or the District Court that Youngstown's practice of contracting out certain work had a discriminatory purpose or was itself a violation of Title VII. The only liability determination against Youngstown is the District Court's order of summary judgment for Petitioners entered August 12, 1977 (Supp. App. C) directed solely to brickmason apprentice positions. Fundamental principles of Constitutional due process, as well as common sense, dictate that any remedy must relate to the violation upon which it is based.

Furthermore, as stated by the Seventh Circuit,

> we know of no authority for the proposition that employees of independent contractors should be deemed employees of the defendant employer for purposes of back pay liability under Title VII. The "contracting out" of masonry work was commonplace in the industry, and Youngstown was under no duty to use its own mason workers when possible rather than to sub-

> contract the work. As the Supreme Court stated in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577-78 (1978), "Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

In short, there is no authority whatsoever, let alone a decision in conflict with that of the Seventh Circuit, to support Petitioners' argument. To the contrary, all Title VII authority supports the Seventh Circuit's decision.

2. The Attorneys' Fees Award Also Is Based Upon Consistent Title VII Precedents

Petitioners baldly assert that the award of attorneys' fees below was inadequate. This assertion is wholly insufficient for granting a writ. However, in order for the Court to appreciate the lack of merit in Petitioners' argument, the following excerpts from the Seventh Circuit and District Court decisions are provided.

The Seventh Circuit stated concerning the District Court's memorandum decision and award (Supp. App. B):

> The court, in its memorandum of May 30, 1980, set forth its findings and conclusions in regard to the allowance of counsel fees. In the memorandum, the court properly asserts its broad discretion in this area and then goes on to explain and support its findings in some detail . . . The court delineated several "serious deficiencies" in the record offered to justify the amount of fees requested by plaintiffs' counsel.
>
> We find that the fees awarded in this case were proper. The court's memorandum is well-reasoned and supported, and its conclusions evidence no abuse of discretion.

The District Court ruled in part (Supp. App. B, pp. 6-7):

> There are serious deficiencies in the record to justify the awarding of the full amounts requested by plaintiffs' counsel. Some of these defects are:
>
> (a) Plaintiffs' attorneys suggest that they should receive a fee of $450 per hour without any showing as to the normal hourly rate they otherwise receive in their practice.
>
> (b) A serious deficiency in the record revolves about the fact that plaintiffs' attorneys have submitted more than 60 pages of vague, duplicitous, unexplained and undifferentiated "time entries" claiming more than 1,750 hours of work in pursuit of this litigation. Among those "entries" are an apparent claim for 4¼ hours and $1,912.50 for Mr. Vital to prepare and file his substitution as attorney for plaintiffs.
>
> (c) Several charges for simply filing documents, such as that of Mr. Vital in the second week of September 1975 of 4 hours and $1,800 for filing notice of deposition documents which apparently had already been charged at about 9½ hours and $4,275 for their preparation. Other illustrative charges for the mere "filing" of documents already prepared include claims for $787.50 (9/30/75), $675.00 (10/1/75), $1,125.00 (10/31/75), $1,012.50 (6/1/79), and $900.00 (7/2/79)—a total of $6,300.00 simply to file six documents in this case. Further, other entries present claims for impossibilities, such as that of February 3, 1976 for $675.00 allegedly to have prepared and filed notices of depositions which had already occurred more than three months earlier in 1975 and for which charges had already been claimed at that time. Mr. Vital also claims 3½ hours and $1,575 for having attended a seminar on 9/25/76, and 5 hours and $2,250.00 on 1/22/75 for his secretary having pre-

pared and mailed certain notices. (By way of example only, Mr. Williams similarly claimed $1,125.00 merely to file a motion on October 10, 1978; and Mr. Garnett states his time to claim 200 hours of undocumented "meetings . . ., office conferences, letters and phone calls and travel, etc.," plus such items as a claim for 11 hours of time in November 1971 to prepare and file stipulations for extensions of time.) Finally, many of the claimed "entries" which can be attributed to any particular aspect of this case refer to the many motions and demands upon which plaintiffs clearly and absolutely did not prevail.

3. The Remedies Entered Against The Respondent Union Are Consistent With Title VII Precedents

Petitioners urge this Court to reconsider the lower court's decision by asserting that "the plaintiffs were denied back-pay . . . and have not been made whole" because the back pay award was entered against Youngstown and not Respondent Local 6 (Petition pp. 14-16).

Once again Petitioners' assertion presents no conceivable basis for granting a writ of *certiorari*. Petitioners are not affected at all by the fact that Youngstown must pay the entire amount of that award and Local 6 is not required to share therein. Further, Petitioners were awarded extensive injunctive and other affirmative relief against Respondent Local 6 (Supp. App. D, pp. 24-26).

B. Petitioners' Judiciary Act Argument Is Frivolous

Petitioners' final argument is that this Court should intervene to exercise its power of supervision over the lower courts based upon the fallacious assertion that one District Court Judge exceeded his authority under the Judiciary Act by allegedly reviewing and reversing the

prior order of another District Court Judge (Petition pp. 5, 17).

First, Petitioners' entire argument is premised upon a misstatement of the record below. As set forth in the Statement of the Case above, the Honorable George N. Beamer on November 4, 1972 entered a class certification order pursuant to Petitioners' motion for same and did not in that order rule on any other issue. In 1977, following Judge Beamer's death, the Honorable Allen Sharp entered an order of partial summary judgment for Respondent Youngstown on certain issues which Petitioner sought to pursue for trial. Judge Sharp left intact the prior class certification order.

Second, even if Judge Sharp had reviewed and modified Judge Beamer's earlier class certification decision, such action would have been entirely consistent with sound judicial administration. A class certification order under Federal Rule of Civil Procedure 23 by its very nature and the terms of Rule 23 "may be altered or amended, before the decision on the merits" (F.R.Civ.P. 23(c)(1)). See also, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469, n. 11, 12 (1978); Wright & Miller, *Federal Practice and Procedure*: Civil § 1785 at 137, n. 81 (1972), and the cases cited there.

In sum, the District Court did not "reverse" any prior order, but even if it had modified the class certification decision, both the District Court and the Seventh Circuit correctly administered this case.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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